Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
Preserving the Open Internet	)	GN Docket No. 09-191
Broadband Industry Practices	)	WC Docket No. 07-52

COMMENTS OF
CINCINNATI BELL WIRELESS LLC

Cincinnati Bell Wireless LLC ("CBW"), by its attorneys, hereby submits its comments on the Commission's Notice of Proposed Rulemaking in the above dockets.[1]

I. INTRODUCTION

CBW is an Ohio limited liability company which holds licenses for Broadband PCS, AWS and 700 MHz services covering the greater Cincinnati and Dayton, Ohio metropolitan areas and surrounding counties in northern Kentucky and southeastern Indiana. CBW provides service to over 500,000 subscribers using GSM and 3G technologies. CBW competes with five national providers and several resellers in its footprint.

As a wireless carrier with a regional footprint, CBW faces a number of challenges in competing with national carriers. CBW is both a retail competitor to and a wholesale roaming customer of many of the nationwide carriers. In order for CBW to compete for the business of wireless customers, it must offer nationwide voice and data roaming that is seamless, reliable and

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1 *Preserving the Open Internet*, Notice of Proposed Rulemaking, GN Docket No. 09-191 *et al*, FCC 09-93 (rel. Oct. 22, 2009).

competitively priced. Under today's technology, CBW is limited to obtaining wholesale roaming services from carriers that use the same underlying technology as CBW (in this case, GSM), thereby limiting the number of potential suppliers of roaming services. Increasingly, CBW is finding it difficult to negotiate nationwide roaming services at favorable rates from its suppliers, due in large part to the increasing consolidation of GSM carriers by the major nationwide carriers. CBW finds it particularly difficult to obtain roaming for data services at reasonable rates. Wholesale data roaming rates are significantly higher than the suppliers' retail end user data roaming charges.

Further, as CBW explained in the *Exclusive Handset Arrangements* proceeding,[2] in recent years, it has become increasing difficult if not impossible for CBW to obtain the latest, technologically advanced and most desirable handsets for its subscribers because of the trend toward exclusive handset arrangements between manufacturers and the largest wireless providers. CBW is blocked from obtaining these handsets for a specified period of time or in some cases indefinitely. As a result of these exclusive handset arrangements, CBW lost customers when handsets like the iPhone or Blackberry Storm were introduced.

In addition, due to exclusive handset arrangements, CBW experiences difficulty in obtaining a sufficiently robust lineup of devices supporting its 3G services. After spending over $25 million to purchase AWS spectrum in the Greater Cincinnati and Dayton markets and an additional $30 million to launch its 3G services in 2008, CBW's ability to deliver advanced broadband wireless services to consumers is severely hampered by the limited number of 3G

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2 *See Wireless Telecommunications Bureau Seeks Comment on Petition for Rulemaking Regarding Exclusivity Arrangements Between commercial Wireless Carriers and Handset Manufacturers*, RM No. 11497, DA 08-2278 (rel. Oct. 10, 2008). CBW filed comments in the proceeding on February 2, 2009.

handsets available using the AWS spectrum. More customers utilize CBW's 2G services than would otherwise, if not for these impediments to obtaining 3G compatible handsets.

CBW is aware that the automatic roaming and exclusive handset proceedings are beyond the scope of this proceeding. It is not the company's intent to ask for relief here. It notes these difficulties in order to provide a fuller picture of the competitive situation that regional wireless carriers face in the market. Given the impediments that it faces, CBW must compete by offering consumers superior coverage and flexible service offerings that meet their needs. CBW attributes its success in the market to its continuous capital investments in the network and quality of service, competitive rate plans and the availability of bundle discounts to customers who subscribe to other services offered by the Cincinnati Bell family of companies.

Indeed, CBW has been designated the "best network in Cincinnati and Dayton" for three years based on independent-third party testing, and operates the most cell towers of any provider in its footprint. CBW offers "no contract" service to residential subscribers,[3] as well as Fusion WiFi service, which combines CBW's wireless service with WiFi access to provide customers with enhanced mobile coverage and faster download speeds through home WiFi connections, over 350 ZoomTown WiFi Hotspots in the Cincinnati and Dayton metropolitan areas, and any other accessible WiFi hotspot. CBW also does not prohibit customers from bringing their own handsets to its service and does not block or impede the customer's ability to use third party applications with its service.

CBW questions the need to apply the "open Internet" principles to wireless providers at all, particularly given the lack of evidence of any problems within the wireless

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3 Since its inception, CBW has never required residential subscribers to enter into a year or multi-year contract.

provider market. However, in the event that the Commission decides to apply the "open Internet" principles to wireless providers, CBW does not believe it is necessary for the Commission to extend such obligations to regional wireless providers at this time. CBW, like other small and regional CMRS providers, lacks the market power to engage in the kinds of activities that the proposed "open Internet" principles are intended to deter. For CBW, "open Internet" principles are not necessary to ensure that it offers just and reasonable services to consumers or that it treats service providers, application providers and content providers fairly. Moreover, CBW is concerned that application of the "open Internet" principles could deter legitimate practices necessary to maintain its superior network experience and/or could limit CBW's ability to offer (and police) competitive rate plans involving broadband Internet services.[4] CBW comments on ways to avoid this impact.

II. REASONABLE NETWORK MANAGEMENT

The *NPRM* proposes six principles for providers of broadband Internet access services. Each of these principles permits a provider to engage in "reasonable network management." Reasonable network management is defined as:

> (a) reasonable practices employed by a provider of broadband Internet access services to:
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> (i) reduce or mitigate the effects of congestion on its network or to address quality of service concerns;
> (ii) address traffic that is unwanted by users or harmful;
> (iii) prevent the transfer of unlawful content; or
> (iv) prevent the unlawful transfer of content; and
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> (b) other reasonable network management practices.[5]

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4 The NPRM does not apply to traditional voice service, short message service (SMS) and media messaging service (MMS) offered by wireless carriers. *NPRM* ¶ 156.

5 *NPRM* Appendix A, § 8.3.

The Commission states that it proposed the principles and the reasonable network management standard at a level of generality designed to "establish clear requirements while giving us the flexibility to consider particular circumstances case by case."[6] Unfortunately, while the proposed principles broadly prohibit certain practices, the "reasonable network management" concept does not provide sufficient clarity for network providers of what is permissible. CBW is concerned that the *NPRM* too narrowly describes network management practices, and therefore would subject too many practices to the vagaries of case by case adjudication. The Commission should provide more clarity in describing how the proposed "reasonable network management" concept would operate in practice, so that network providers can be confident that their practices are permissible, without seeking case by case guidance or waiting for possible complaint proceedings.

A. Reasonable Network Management Should be Flexible Based Upon the Provider and the Technology Utilized

The "reasonable network management" definition lacks an explicit recognition that reasonableness is context-dependent. In particular, when addressing capacity constraints, the definition should provide more flexibility to smaller network operators and in the case of legacy network technologies. Although the *NPRM* alludes to the idea that measures to address congestion could vary by platform, its discussion focuses on *temporary* measures for addressing capacity overload.[7] Indeed, the proposed definition allows measures to *reduce* or *mitigate* congestion, but does not discuss proactive measures to prevent congestion from developing in the first place. This is particularly important for a smaller network operator that lacks the scale

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6 *NPRM* ¶ 89. The Commission intends to "leave more detailed rulings to the adjudication of particular cases." *Id.* ¶ 134.

7 *NPRM* ¶ 137 ("it may be reasonable for an Internet service provider to *temporarily limit* the bandwidth available … until the period of congestion has passed.") (emphasis added).

and scope to upgrade network technologies repeatedly. For example, because of its size and larger carriers' handset exclusivity arrangements, CBW cannot secure enough 3G handsets to meet its needs, and fewer customers have migrated to that platform. As a result, CBW has a larger volume of traffic on its 2G network, where it costs approximately twice as much for CBW to add capacity than it does for its 3G network. Given the higher cost of adding 2G capacity, it would be reasonable for CBW to proactively limit certain uses of its 2G network, or perhaps prohibit certain applications until such time as it can migrate more customers to its 3G network. This type of congestion management is reasonable for a smaller wireless carrier (at least until the FCC expands the availability of non-exclusive 3G handsets). CBW should not have to wait for congestion to affect customers (and impair quality of service) before it manages its network.

Similarly, the *NPRM* appears to treat all network providers using a given technology the same. In other words, CBW may be held to the same standard in managing its wireless network as AT&T or Verizon, even though AT&T and Verizon will have alternatives available to them due to their size and scope that are not equally available to CBW. Suppose, for example, that a carrier had additional capacity that could be activated fairly quickly, or the ability to migrate customers to a more advanced platform to relieve congestion. It might be reasonable to limit traffic congestion measures to temporary actions in that instance, but not for the provider without additional spectrum ready for commercial use. Smaller and regional providers have fewer alternatives to employing certain network management techniques, and the Commission's rules should recognize that they will need greater leeway in managing their networks. If the Commission applies the "open Internet" principles to regional wireless carriers at all, it should ensure that the reasonableness of the carrier's practices will be judged in light of its resources and abilities.

This is not to say that network management should be limited to a "least restrictive means." In fact, the FCC should preclude application of such a principle to network management. Providers should be permitted to use *any* measure that is reasonable (without having to demonstrate, for example, that it was the *most* reasonable measure). To require a least restrictive means test would impose overwhelming burdens on network operators and virtually guarantee litigation over all network management practices. Such a result directly contradicts the Commission's goals.

To address these concerns, CBW recommends that the definition of reasonable network management be revised to read as follows (new or revised language shown in *italics*):

> "Reasonable network management consists of: (a) *any* reasonable *practice* employed by a provider of broadband Internet access services, *taking in consideration the size and resources of the provider, and the technologies involved,* to ..."

B. Reasonable Network Management Should Include Practices Designed to Enforce Plan Limitations and Tiers of Service

Further, the *NPRM*'s definition of reasonable network management would permit providers to block "harmful traffic," "unwanted traffic" and "unlawful" content (or unlawful transfers of content), but it does not explicitly address management practices to protect the service provider's own rights. As discussed above, CBW offers subscribers a variety of service packages and data plans. Some offer unlimited mobile browsing and access to applications, while others offer "lite" packages with limited browsing or access to applications. Service providers are justified in ensuring that all customers "get what they pay for" and, equally importantly, "pay for what they get (or use)." A variety of network management techniques could appropriately be used to monitor and enforce such plan limitations, including some

techniques that might in the abstract be restricted and/or deemed unreasonable by the proposed "open Internet" principles.

The problem is that the definition of "reasonable network management" does not currently address use of network management for these purposes. Subpart (ii) of the definition addresses traffic that is "unwanted" by or "harmful" to the user, and would not address the service provider's rights under the terms of service. Subpart (iii) addresses "unlawful" content and subpart (iv) addresses "unlawful transfers" of content, but it is not clear that either clause encompasses limitations inherent in the plan chosen by the subscriber. The Commission should revise the definition so that it clearly permits a service provider to use network management techniques to enforce plan limitations and tiers of service. A model for such language could come from Section 222 of the Communications Act, which permits a carrier to use CPNI "to protect the rights or property of the carrier."[8]

Similarly, CBW offers "tethering" plans to its subscribers. Tethering is the use of a handset as a modem to enable another device – most commonly, a laptop computer – to connect to the CMRS provider's network. CBW does not prohibit tethering by its customers, but requires subscribers who wish to use their device in this manner to sign up for a tethering option. This requirement is based on the increased demands that tethering sessions place on the network compared to traditional voice calls or data uses. Unlike other uses of the handset, tethering sessions tend to be significantly longer and occupy more network resources. The tethering plan compensates CBW for the additional burden this use places on the network. As discussed above,

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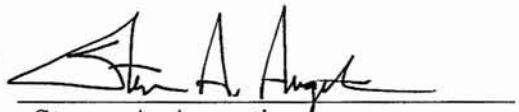
[8] 47 U.S.C. § 222(d)(2). Section 222(d)(2) also includes language similar to subparts (ii), (iii) and (iv) of the proposed definition of "reasonable network management." *Id.* (allowing use of CPNI "to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such services").

nothing in this proceeding should restrict a CMRS provider's ability to monitor and enforce the terms and conditions of a subscriber's chosen service plan.

III. CONCLUSION

For the foregoing reasons, CBW requests that the Commission forego application of the "open Internet" principles to small and regional wireless providers. Alternatively, CBW requests that the Commission define "reasonable network management" in order to provide the additional clarity described above.

Respectfully submitted,



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